

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503
Boston, MA 02108
(617) 727-2293

JAVED SHARWANI,
Appellant

v.

D-05-126

MASSACHUSETTS HIGHWAY
DEPARTMENT,
Respondent

Appellant's Attorney:

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Commissioner:

Christopher C. Bowman

DECISION

The Appellant, Javed A. Sharwani (hereafter "Sharwani" or "Appellant"), pursuant to G.L. c. 31, § 43, filed a timely appeal with the Commission claiming that the

Massachusetts Highway Department (hereafter “MassHighway” or “Appointing Authority”) did not have just cause to terminate him on April 8, 2005.¹

A hearing was conducted on January 7, 2008 at the offices of the Civil Service Commission. As no written request was received from either party, the hearing was declared private. One (1) tape was made of the hearing.

FINDINGS OF FACT:

Fifteen (15) exhibits were entered into evidence at the hearing. Based on the documents submitted and the testimony of the following witnesses:

For the Appointing Authority:

- Christopher J. Groll, Esq., Director of Labor Relations, MassHighway;
- Albert Stegemann, District 2 Highway Director, MassHighway;
- Richard Masse, District 2 Project Development Engineer, MassHighway;
- Brett Loosian, District 4 Maintenance Director, MassHighway;

For the Appellant:

- Javed Sharwani, Appellant;

I make the following findings of fact:

1. The Appellant, Javed Sharwani, was a tenured civil service employee of the Massachusetts Highway Department in the position of Civil Engineer III at the time of his termination. He had been employed by the Appointing Authority for

¹ As part of the same appeal form, the Appellant also filed an appeal under G.L. c. 31, § 42 regarding procedural issues related to his termination. Counsel for the Appellant waived that appeal during the full hearing before the Commission.

approximately twenty-one (21) years at the time of his termination. (Testimony of Appellant)

2. The Appellant received a bachelors degree in civil engineering in 1969 and a masters degree in civil engineering in 1989. He is a registered professional engineer in Massachusetts and Nevada. (Testimony of Appellant and Exhibit 14)
3. At all times relevant to the instant appeal, the Appellant was assigned to MassHighway's Maintenance Division in District 4, whose main administrative offices are located at 519 Appleton Street, Arlington, Massachusetts, just off of Route 2. The Appellant's direct supervisor was Brett Loosian. (Testimony of Appellant and Loosian)
4. The Appellant was issued a two-day suspension without pay on January 5, 2004 for falsifying the daily sign in/out sheet and for failing to properly account for his work hours on his weekly timesheet regarding his attendance at a job interview held in Boston. (Exhibit 1)
5. The Appellant was issued a three-day suspension on February 9, 2004 for his unauthorized absence and submission of an inaccurate timesheet in violation of Department policies. This suspension concerned his attendance at a job interview at MassHighway – District 2. (Exhibit 2) The main administrative offices for District 2 are located in Northampton, MA, just off of Route 91. (Testimony of Masse)
6. As a result of the above-referenced suspensions, the Appellant filed a claim on or about February 11, 2004 against the Appointing Authority with the Massachusetts Commission Against Discrimination (hereafter "MCAD"). (Exhibit 3 and Testimony of Groll)

7. As a result of the MCAD claim, the Appointing Authority and the Appellant entered into a Pre-Determination Settlement Agreement on April 8, 2004. Paragraph “C” of said Agreement reads: “In the future, Complainant must obtain prior written approval from his supervisor, or the supervisor’s designee, for any and all absences relating to interviews. Complainant shall be expected to accurately account for all of his time during the workday, utilizing the sign in/out sheet.” Paragraph “D” of said Agreement reads in pertinent part: “The parties agree that in future disciplinary matters, Respondent can rely on the record of past disciplinary actions including the suspensions...”. (Exhibit 3)
8. Less than two months after signing the above-referenced agreement, the Appellant was suspended for 5 days without pay on June 30, 2004 for his unauthorized absence and submission of an inaccurate time sheet. The 5-day suspension concerned the Appellant’s attendance at a job interview in District 2 (Northampton) in which he did not return back to District 4 (Arlington) after the interview, nor did he accurately reflect all of his time on his weekly time sheet. (Exhibit 4)
9. Christopher Groll, Director of Labor Relations at MassHighway, hand-delivered the 5-day suspension letter to the Appellant in District 4 and counseled him as to the proper procedures for going to an interview and accounting for his time. Mr. Groll specifically informed the Appellant of the of the acceptable travel route between District 4 and District 2, as well as the allotted travel time he would be given; namely, 2 hours each way. (Testimony of Groll) The Appellant testified that it requires 2 hours and 15 minutes of travel time between Arlington and Northampton. (Testimony of Appellant)

10. Christopher Groll was a good witness who offered credible testimony before the Commission. He is a consummate professional who takes his job duties and responsibilities as Director of Labor Relations seriously. His answers were thoughtful and consistent with the documentary evidence entered as part of the record in this case. Moreover, Mr. Groll appeared to take several steps in order to prevent the termination of the Appellant, including coaching, progressive discipline and, finally, giving the Appellant the opportunity to enter into a “last chance agreement” instead of termination. I find that he had no ulterior motive for recommending the termination of the Appellant. (Testimony, demeanor of Groll)
11. Despite the credible testimony of Mr. Groll that he counseled the Appellant and offered him explicit instructions regarding permissible travel time related to interviews, including interviews in Northampton, the Appellant testified that it was his understanding that employees could, “just go and take whatever time it takes; do the best to return back to work, but there is no rigid rule; nobody has ever mentioned that.” (Testimony of Appellant)
12. On December 22, 2004, approximately six months after receiving his third suspension, the Appellant was scheduled for a job interview in District 2 in Northampton, MA. The Appellant testified before the Commission that he left District 4 in Arlington, MA just before 9:00 A.M. in a state vehicle. (Testimony of Appellant) The interview (with Richard Masse) was scheduled for 11:00 A.M. in the District 2 office in Northampton. The interview began shortly after 11:00 A.M. and lasted until approximately 11:45 A.M. (Testimony of Masse)

13. Al Stegemann, the District Highway Director in District 2 since 2003, offered credible testimony that he saw the Appellant exit the Northampton facility and walk toward the parking lot at 11:45 A.M. on the day in question. (Testimony of Stegemann)
14. The Appellant did not arrive back in District 4 at the Arlington facility until 4:15 P.M., 4 ½ hours after he concluded his interview and was seen leaving the Northampton facility. (Testimony of Appellant)
15. In addition to the 2 hours in allotted travel time, the Appellant is entitled to a 45-minute lunch and 2, 15-minute breaks. (Testimony of Appellant)
16. Even when considering the above-referenced lunch and break time, there is still 1 hour and 15 minutes of time that is unaccounted for on the day in question.
17. During his testimony before the Civil Service Commission, the Appellant testified that while returning to Arlington on the day of his interview, he deviated from the normal, prescribed route of Interstate 91 to the Massachusetts Turnpike (MassPike) by exiting at Route 5 so that he could stop for lunch at a Burger King. After leaving the Burger King, the Appellant testified that he stopped for two additional bathroom breaks. After the bathroom breaks, the Appellant testified that he encountered heavy, “bumper-to-bumper traffic” on Route 128 and that “traffic wasn’t moving anywhere...there must have been an accident.” Asked later in his testimony if the traffic jam was “horrendous”, the Appellant testified that it was. (Testimony of Appellant)
18. Mr. Groll testified that upon being informed that the Appellant was once again tardy on his return from a promotional interview, he called the MassHighway Traffic

Operations Center to check whether or not there were any traffic situations (accidents or otherwise) that had occurred on December 22, 2004 that would cause severe traffic congestion and account for his delayed return. Mr. Groll stated that he was informed that there were not any traffic accidents or incidents, nor was traffic excessively heavy that day. Mr. Groll also testified that the instant hearing before the Commission was the first time that the Appellant ever raised traffic congestion as a reason for his late return to the office on the day in question. (Testimony of Groll)

19. The proper protocol for District 4 personnel in Arlington when they have to leave the District 4 office is to sign-out in the Field Visit Log, listing the date, their name, the time they left, their destination, their approximate return time. Upon the employee's return, he/she is to sign-in and list his/her actual return time. (Testimony of Loosian).
20. The Appellant did not follow the above-referenced sign-out protocol on the day in question, as he did not fill-out the Field Visit Log upon his departure. Rather, when the Appellant returned to District 4, he signed back in at 4:15 P.M., then backfilled the other required information, indicating that he left at 8:55 A.M. to go to Northampton and listed 4:00 P.M. as his expected return time. (Exhibit 5)
21. The Appellant did not charge any vacation and/or personal time on his weekly timesheet for December 22, 2004. (Exhibit 8)
22. At all times relevant to the instant appeal, the Appellant's supervisor was Brett Loosian (hereinafter "Loosian"). Loosian did not give the Appellant any special permission regarding his travel to the interview in District 2 on December 22nd, nor did the Appellant speak with him upon his return to explain why it had taken the Appellant almost an entire day to attend the interview. (Testimony of Loosian)

23. Asked by this Commissioner, after having been suspended on three previous occasions for not returning to work in a timely manner after interviews, why he never informed his supervisor upon his return about the purported traffic delays, the Appellant testified that, “I met him; I was thinking if there were any questions, he would ask me...if he had any questions, my desk was right in front of his.” Further, the Appellant testified that his supervisor was intimidated by the Appellant’s superior qualifications. (Testimony of Appellant)
24. Although the Appellant is a polite, likeable individual with many years of service to the Commonwealth, I give little weight to the Appellant’s testimony before the Commission. Having been suspended on three prior occasions for not returning to work in a timely manner after an interview, it is not conceivable that, after purportedly experiencing a “horrendous” traffic jam, that he would not notify his supervisor of this, thus justifying his late return. Moreover, even if there was a horrendous traffic jam on the day in question, it was incumbent upon the Appellant, particularly in light of his three prior suspensions and the written MCAD agreement, to notify his supervisor why he was late in returning to the office. (Testimony, demeanor of Appellant)
25. As a result of the above-referenced incident, the Appointing Authority scheduled a disciplinary hearing for the Appellant on January 14, 2005. (Testimony of Groll)
26. At the hearing before the Appointing Authority regarding the December 22nd incident, the parties agreed in principle to a Last Chance Agreement in which the Appellant would serve a 10-day unpaid suspension, in lieu of termination from his position with

the Department, and once again agree to comply with all Department policies regarding accounting for his time going to interviews. (Testimony of Groll)

27. Subsequent to the hearing on January 14, 2005, Groll drafted the Last Chance Agreement and sent it to the Mr. Achille, the Appellant's union representative, for his review, signature and the Appellant's signature. The Agreement was never signed and shortly thereafter the Appellant went on an approved extended vacation.

(Testimony of Groll)

28. Mr. Groll next saw the Appellant sometime in March 2005 when Mr. Groll was out at District 4 on unrelated department business. After seeing the Appellant, Mr. Groll called Achille and notified him that the Appellant was back from his extended vacation and reminded Achille that there was still no signed Agreement as discussed on January 14th. (Testimony of Groll)

29. In light of the fact that an Agreement was never signed, Mr. Groll hand-delivered a second hearing notice to the Appellant on April 4, 2005, advising the Appellant that another hearing pursuant to G.L. c. 31 § 41 would be held on April 8, 2005 to determine if the Appellant should be terminated from his employment based on the factual allegations of December 22, 2004. Mr. Groll further notified the Appellant that the Department would still honor the terms of the Last Chance Agreement.

(Exhibit 11 and testimony of Groll)

30. Sharwani did not produce a signed Agreement by 3:00 P.M. on April 8, 2005, the deadline set by MassHighway. As such, the Appointing Authority's disciplinary hearing went forward and the Appellant was terminated on April 8, 2005. (Testimony of Groll and Exhibit 12)

CONCLUSION

The role of the Civil Service Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300,304 (1997). See Town of Watertown v. Arria, 16 Mass. App. Ct. 331 (1983); McIsaac v. Civil Service Commission, 38 Mass. App. Ct. 473, 477 (1995); Police Department of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). An action is "justified" when it is done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Id. at 304, quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928); Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 211, 214 (1971). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983); School Committee of Brockton v. Civil Service Commission, 43 Mass. App. Ct. 486, 488 (1997). The Appointing Authority's burden of proof is one of a preponderance of the evidence which is established "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956). In reviewing an appeal under G.L. c. 31, §43, if the Commission finds by a preponderance of the evidence that there was just

cause for an action taken against an appellant, the Commission shall affirm the action of the appointing authority. Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 800 (2004).

The issue for the commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the Appointing Authority made its decision." Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983). *See* Commissioners of Civil Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

The Appointing Authority has demonstrated by a preponderance of the credible evidence that it had reasonable justification for terminating the Appellant from his position as a CE III. They had disciplined the Appellant, in the form of unpaid suspensions, on three prior occasions, for failing to return to work in a timely manner and/or failing to account for his time after attending promotional interviews. The specific reasons cited in his suspension letters included taking an exorbitant amount of travel time to attend promotional interviews and inaccurately accounting for what amounted to an unauthorized absence on his weekly timesheet. Further, the Appellant was personally counseled as to the proper procedures for going to said interviews and charging the time appropriately on his timesheet, including the specific route he was to follow when travelling between Arlington and Northampton, as well as the time he would be allotted for such travel. Lastly, the Appellant entered into a Pre-Determination Settlement

Agreement with the Department that expressly stated the conditions and terms relating to all absences relating to interviews.

Despite these three prior suspensions, the Appellant, on December 22, 2004, once again took excessive time to attend a promotional interview in Northampton and failed to return to work in Arlington in a timely manner and/or properly account for his time.

During his testimony before the Commission, the Appellant gave a multi-part explanation as to why it took him over four (4) hours to return from an interview held in Northampton. First, the Appellant testified that he deviated from the normal, prescribed route of Interstate 91 to the Massachusetts Turnpike (MassPike) by exiting at Route 5 so that he could stop for lunch at a Burger King. Then, after getting on the MassPike, the Appellant testified that he stopped twice for bathroom breaks. Lastly, the Appellant testified that there was heavy traffic on Route 128. The Appellant claims the totality of these factors resulted in his unusually long return trip home.

The Appellant's explanation for the excessive amount of travel time does not add up, nor is it credible. First, allowing for a 30-minute interview, a 45-minute lunch period, two 15-minute breaks, and a reasonable 2 hour ride home, Sharwani should have arrived back at District 4 in Arlington no later than approximately 3:00 P.M.. Yet when the Appellant filled out the Field Visit Log, which he did not do until after he actually arrived back at 4:15, he listed 4:00 PM as his expected return time. Loosian testified that the Appellant never sought, nor did he approve, a 4:00 PM return time.

Given that he was on express notice that he was to obtain permission from his supervisor for any absences related to job interviews, and that he should not have expected to return back to District 4 any later than 3:00 P.M., his "after-the-fact" notation

of an expected return time of 4:00 P.M. on the Field Visit Log appears to be an attempt to cover up his actions.

Similarly, the Appellant's decision to venture off of the approved travel route to have lunch at Burger King cannot be used to justify his lengthy delay in returning to District 4. As was amply demonstrated by his prior suspension letters, this was not the first time that he had travelled to District 2. There are rest areas along the MassPike on his approved route where he could have obtained lunch, but he chose not to utilize those services.

The Appellant's testimony that he was stuck in traffic on Route 128 was also directly refuted by Mr. Groll who testified that, upon being informed that the Appellant was once again tardy on his return from a promotional interview, he called the MassHighway Traffic Operations Center to check whether or not there were any traffic situations (accidents or otherwise) that had occurred on December 22, 2004 that would cause severe traffic congestion and account for his delayed return. Groll stated that he was informed that there were not any traffic accidents or incidents, nor was traffic excessively heavy that day. Moreover, Mr. Groll testified that the instant hearing was the first time that the Appellant ever raised traffic congestion as an excuse.

Finally, despite the fact that the Appellant was on clear notice of what was expected of him relative to these external interviews, and had received multiple suspensions for this exact infraction, he never attempted to explain the reasons for his late return.

As fully discussed above, the Appellant's explanation of his unreasonable amount of travel time is not credible, especially in light of the fact that he was disciplined and counseled several times on this very same matter. The rehabilitative component of

progressive discipline failed to produce the desired result and the Appointing Authority had just cause to terminate the Appellant for his repeated misconduct.

For all of the above reasons, the Appellant's appeal under Docket No. D-05-126 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman, Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Guerin, Marquis and Taylor, Commissioners [Henderson – Absent]) on March 13, 2008.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice:

Galen Gilbert, Esq. (for Appellant)

John Casey, Esq. (for Appointing Authority)